Leather Agent, Inc. *and* Glove Cities District of the Amalgamated Northeast Regional Joint Board, U.N.I.T.E., AFL–CIO. Case 3–CA–20451

February 16, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On October 23, 1997, Administrative Law Judge Joel P. Biblowitz, issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The Respondent operates a tannery. Its work is seasonal, generally running from November to June or July. For the 1994–1995 and 1995–1996 seasons, the Respondent was principally involved in processing deerskins for Hershey International.

The Respondent hired Larry Burdick in November 1994. After initial service as a floor worker, he performed fleshing work. Fleshing is a specialty skill in the tanning industry that involves using certain machines to remove the animal flesh from the skins. At the conclusion of the 1994–1995 tanning season, the Respondent retained Burdick to perform general maintenance and cleanup work. For the 1995–96 tanning season, Burdick served as the Respondent's primary flesher.

In the spring of 1996, a union organizing drive, led by employee Keith Williams, began among the Respondent's employees. Williams was Burdick's cousin. Burdick and his wife Carol were among the first card signers. They served on the Union's organizing committee. There is no direct evidence, however, that the Respondent was aware of the Burdicks' involvement in these union activities.

On April 18, 1996,[2] the Union filed a representation petition. The May 24 election resulted in an 8 to 8 tally. The Union filed objections. A hearing took place on July 12 and 15. Burdick was among 10 employees who testified for the Union.

Plant Manager Robert Hutchins kept personnel records, including notes of discipline, for all employees. The records, in log form, were prepared by Hutchins' wife at his direction. For Burdick, Hutchins' log referred to incidents of late arrivals or early departures in 1994 and 1995. In the 3 months after the April 18 filing of the election petition, however, the Respondent issued Burdick three verbal warnings for not taking his morning break at the proper time, a verbal warning for punching his wife's timecard, and two verbal warnings for abusive operation of his fleshing machine.

On July 31, at the conclusion of the season, the Respondent laid off Burdick. The Respondent sent Burdick a form letter essentially stating that due to business uncertainties

> we do not know and thus cannot advise you if or when we may have further work for which you may be qualified, either this season, next season or any time in the future. Accordingly, you should not rely upon the fact that there will be employment available for you in the future.
>
> We thank you for your efforts on behalf on the company during this season.

On October 15, a Board hearing officer recommended sustaining two objections to the May 24 election and holding a second election. On December 2, Carol Burdick stopped by the plant and asked Hutchins when she would start working for the 1996–1997 season. Hutchins replied, "Probably the following Tuesday." Carol then asked "What about Larry?" Hutchins answered, "I don't know about Larry yet. He gave me a lot of grief, I'm still thinking about it. But I'm not sure whether I'm going to call him back or not." Carol told Larry about that conversation.

The next day, December 3, Larry Burdick called Hutchins. According to Burdick's credited testimony, he asked whether he was being called back to work. Hutchins replied, "No, because you gave me a lot of grief." Hutchins said he had a flesher and asked where Burdick's "savior" was now.[3] Hutchins added that the Union did not run the shop, he did. Hutchins concluded by saying that he was unsure what he might do concerning Burdick, but if another job became available, Burdick should take it. Hutchins asked Harry Miller, who also testified for the Union at the Board hearing on objections, to replace Burdick as the primary flesher. (Miller declined the job offer.) At the unfair labor practice hearing, Hutchins testified about problems with Burdick, including the facts that (1) he abused the tanning machinery; (2) he left too much flesh on the animal skins, a production error that required the Respondent to give an $8000 credit to its principal customer; and (3) he did not follow the plant rules for breaktimes.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are in 1996 unless otherwise noted.

[3] Burdick interpreted the "savior" remark as a reference to Williams, who also did not return to work for the Respondent.

Applying a *Wright Line* analysis,[4] the judge found that the General Counsel met his initial evidentiary burden of proving antiunion motivation for the refusal to recall Burdick and that the Respondent had failed to show that it would not have recalled him even in the absence of his union activities. Consequently, the judge found that the failure to recall Burdick violated Section 8(a)(3). He also found that Hutchins' statements to Burdick on December 3 violated Section 8(a)(1).

Contrary to the judge, we find that the General Counsel failed to establish that Burdick's union activities were a motivating factor in the Respondent's decision not to recall him. Further, even assuming, arguendo, that the General Counsel had met his initial *Wright Line* burden, we find that the Respondent established that it would have taken the same action irrespective of Burdick's union activities.

We particularly rely on the limited nature of Burdick's union activities known to the Respondent, the dearth of evidence that the Respondent bore any animus towards these activities, and the compelling evidence of problems with Burdick's work performance. As found by the judge, the Respondent's only knowledge of Burdick's ties to the Union stemmed from the fact that the Union called Burdick as a witness in the July 1996 representation hearing on the Union's objections to the election. Not only is this union activity extremely limited, but Burdick was only 1 of 10 employees to testify for the Union at that hearing. Significantly, the Respondent rehired several of these employees, including Burdick's wife, in late 1996. The Respondent also offered to rehire union witness Miller to the fleshing position that Burdick previously had held. In these circumstances, we find little support for the argument that the Respondent discriminated against Burdick because of his union activities.

Despite this significant weakness in the General Counsel's case, the judge nonetheless inferred that the Respondent must have been unlawfully motivated against Burdick because he was subject to a substantial increase in disciplinary action between the April 1996 filing of the representation election petition and the July 31 date of his layoff. We find no support for this inference. The vast preponderance of Burdick's discipline predated the July representation hearing—the earliest point at which the Respondent learned of Burdick's union activity. Furthermore, there is ample record support for the proposition that the discipline was lawfully imposed. In this regard, the judge himself found that this onslaught of discipline could signify one of two things: (1) that Burdick's performance degenerated in mid-1996; or (2) that the Respondent's attitude toward Burdick changed. Without adequate evidentiary support, the judge concluded that the latter was "more likely." We disagree. As discussed below, the record clearly establishes that Burdick committed the several offenses in 1996 for which he was legitimately disciplined.

For example, in April and May, the Respondent issued Burdick several warnings for taking breaks during unscheduled times. The record establishes, and Burdick concedes, that during this period he began taking breaks at 10 a.m. instead of complying with the scheduled 9:30 to 9:45 a.m. breaktime. Despite the Respondent's repeated admonitions that he adhere to the scheduled break period, Burdick admittedly persisted in taking late breaks. As a consequence, Burdick was verbally disciplined. There is no evidence that this discipline was disparately imposed on Burdick. Indeed, there is no evidence that any other employee flouted the break rules, or that Burdick had done so prior to the period for which he was disciplined.

Next, Burdick was verbally warned in May for punching another employee's timecard, contrary to the Respondent's rules. Again, Burdick concedes that he punched his wife's timecard in May. Further, Burdick admits that in 1995, well before the union organizing campaign, he was similarly disciplined for another infraction of this rule. Thus, we find nothing in the 1996 timecard discipline that raises the slightest specter of antiunion motivation.

Most significantly, beginning in March—well before the Union filed its election petition—the Respondent began informing Burdick that the quality of his work was unsatisfactory. The Respondent repeatedly told Burdick that he was leaving too much flesh on the deerskins that he was tanning. Indeed, as a direct consequence of Burdick's failure to adequately clean the deerskins, the Respondent was required to credit $8000 to its principal customer in 1996.[5]

During the same period, the Respondent also repeatedly told Burdick that he was abusing the fleshing equipment by rough treatment. As a result of Burdick's conduct, the Respondent issued him warnings on June 12 and July 29 for abusing his machinery. Indeed, Burdick admitted that: he received warnings for allegedly abusing his equipment; these warnings normally were issued on days when the tanning machinery that he was operating broke down; he was hard on the machinery;[6] and the Respondent informed him that he would be discharged if he persisted in abusing the equipment.

[4] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983); also see *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

[5] Burdick testified that during the 1994–1995 work season, he was once told that he was a good worker. Assuming this to be true, we do not find it significant because Burdick was cleaning sheepskin at that time, rather than the more difficult deerskin that he was handling in 1995–1996.

[6] Burdick conceded that he was hard on the machines, stating, "I'm a pounder. . . . They [the machines] don't hold up. Ain't my fault."

There is no evidence that Burdick had committed the aforementioned offenses prior to 1996 (except for a timecard violation), that he was disparately disciplined for his 1996 conduct, or that the discipline was disproportionate to the respective offenses. In these circumstances, we reject, as unsupported supposition, the judge's "inescapable conclusion" that Burdick's 1996 discipline resulted from his union activities.

Notwithstanding the above discipline, which we find warrants no inference of union animus or unlawful motivation, and the fact that Burdick's July layoff was neither alleged nor found to be unlawful, the judge found that the failure to recall Burdick was unlawful. In support of this finding, there remains only the judge's interpretation of remarks by Plant Manager Hutchins to Burdick in December.

As previously stated, Carol Burdick learned that, although she would soon be recalled to her position with the Respondent (notwithstanding a record of union activity virtually identical to her husband's), Hutchins was unsure about Larry Burdick's prospects for recall. When Larry telephoned Hutchins on December 3, the plant manager said that Burdick was not being called back because he had given Hutchins a lot of grief and because Hutchins had another flesher. Hutchins concluded the discussion by asking "where [Burdick's] savior was . . . that the Union doesn't run the shop, he does."

The judge inferred that Hutchins' reference to "grief" in his discussion with Burdick could only have pertained to Burdick's union activities and to Burdick's breaktime discussions with union adherent Williams. We disagree. First, we reject the judge's conclusion that "grief" necessarily refers to Burdick's union activities. There is no apparent distinction between these activities and the union activities of Carol Burdick, Harry Miller, and others whom the Respondent recalled or attempted to recall. Given the discipline Burdick accrued in 1996 for persistently refusing to comply with scheduled breaktimes, abusing equipment, and improperly tanning, it is at least equally as probable that "grief" referred to Burdick's work problems. Second, there is no testimony that breaktime discussions with Williams were even mentioned in Burdick's phone call to Hutchins. In these circumstances, we find that the judge's inference is not supported, and we dismiss the allegation that Hutchins' statement violated Section 8(a)(1).

We recognize that Hutchins asked Burdick where his savior was and stated that the Union does not "run the shop." However, this fact does not establish a violation of Section 8(a)(1) or (3) in the circumstances of this case. At most, it establishes Hutchins' view that the Union could not alter the decision not to rehire Burdick; but that does not make the decision itself unlawful. Even if this reference to the Union were sufficient to meet the General Counsel's initial *Wright Line* burden, it is clear that Burdick's work problems were such that the Respondent would not have rehired him in any event.

Therefore, contrary to the judge, we find that the record does not establish that the Respondent failed to recall employee Larry Burdick in December 1996, because of Burdick's union activities. Accordingly, we shall dismiss complaint in its entirety.

ORDER

The complaint is dismissed.

Alfred M. Norek, Esq., for the General Counsel.
Jeffrey P. Englander, Esq. (*Morrison, Cohen, Singer, & Weinstein*), for the Respondent.
William Pozefsky, Esq. (*Pozefsky, Bramley & Murphy*), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge.This case was heard by me in Albany, New York, on September 15, 1997. The consolidated complaint, which issued on July 11, 1997, and was based on an unfair labor practice charge filed by Glove Cities District of the Amalgamated Northeast Regional Joint Board, U.N.I.T.E., AFL–CIO, CLC (the Union), on December 23, 1996,[1] and amended on January 15 and April 4, alleges that on about December 3, Leather Agent, Inc. (the Respondent) informed an employee that he would not be recalled to work because he had supported the Union, and that since about December 1, Respondent has failed to recall its employee Larry Burdick for work, in violation of Section 8(a)(1) and (3) of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

It is alleged that on about December 3, the Respondent informed Burdick that he would not be recalled to work because of his union activities, and that Respondent failed to recall him to employment at that time because of his union activities. Respondent denies knowledge of his union activities, except that he, and a number of other employees, testified at a Board representation hearing on challenges and objections on July 12 and 15, and defends that he was not recalled because of his poor work quality and attitude, as well as other reasons.

Respondent is engaged in the business of tanning leather hides and skins, principally deerskins, and principally on a contract basis. Its business is seasonal, usually from about November to June, the deer season, and, apparently, most of its employees work only during this period. Burdick was hired by the Respondent in November 1994 as a flesher; this involves

[1] Unless indicated otherwise, all dates referred to relate to the year 1996.

removing the flesh from the deerskin by machine. There are a limited number of individuals who are experienced fleshers, and Burdick had about 20 years' experience in the field prior to his employment with the Respondent. He was not laid off at the end of the 1994–1995 season; rather, Respondent, by Robert Hutchins, its plant manager, assigned him to maintenance and floor work between June and November 1995, when the deer and fleshing season resumed. He was laid off, for the first time by the Respondent, on July 31. As a flesher he was paid on a piece rate basis; translated to an hourly basis, he earned between $14 and $15 an hour while employed by the Respondent.

Robert Compani, the union organizer, testified that the Union was contacted by some of the Respondent's employees, including Keith Williams, Burdick's cousin, about organizing them. He went to the homes of a number of employees, including the Burdick's, spoke about the Union and obtained signed authorization cards. In addition, Burdick, his wife, and fellow employee Carol Burdick and Williams were among the members of the Union's organizing committee, although he never informed the Respondent of the members of this committee. Burdick was told of the union campaign by Williams. Compani came to his house on April 13, and he signed a card for the Union at that time. In addition, he went to union meetings and spoke to some other employees about the Union. On his employment application with the Respondent, completed on October 26, 1994, he listed his three most recent employers; the most recent of which, Allied Splits, where he had been employed from about 1986 to 1994, when it closed down, was represented by the Union. Burdick was 1 of 10 employees who were called to testify by the Union at the representation hearing on July 12 and 15; Williams and Carol Burdick were among these union witnesses. In addition, another employee of Respondent, Gene Young, was subpoenaed by the Union to testify at the hearing, asked for and received permission from the Respondent to leave work, but was never called to testify. Hutchins testified that in November he called Harry Miller, a former employee who had testified for the Union at the representation hearing to be the Respondent's flesher in place of Burdick. Young, Raymond Palmeter, and Carol Burdick were all recalled to employment by the Respondent for the 1996–1997 season even though they too had testified, or appeared on behalf of the Union at the representation hearing. Hutchins testified that nobody ever told him that Burdick was a member of the Union's organizing committee and other than his testimony at the Board's representation hearing on July 12, he had no information as to whether Burdick was a union supporter, and Burdick's alleged union activities and support played no part in his decision not to recall him for the 1996–1997 season. He also testified that he did not know that Williams started the Union's organizing campaign.

On being laid off on July 31, Burdick received the following letter from the Respondent, by Hutchins:

> Because our work on behalf of Hershey's International, Inc. will be completed for all intents and purposes by the end of this week, we have no further work for you as of the close of business today. Since we have no way of knowing when or if we will receive further work from Hershey's International, Inc., or from any other source and because of the difficulties brought on by Leather Agent's now being in reorganization under Federal Bankruptcy Laws, we do not know and thus cannot advise you if or when we may have further work for which you may be qualified, either this season, next season, or at any time in the future. Accordingly, you should not rely upon the fact that there will be employment available for you in the future.
>
> We thank you for your efforts on behalf of the company during this season.

Carol Burdick began working for the Respondent in about January 1995; because the Respondent had a Government contract, she worked continuously, apparently, until about July, when she was laid off. On about December 2, she went to the plant and spoke to Hutchins. She asked him when she was going to start, and Hutchins said probably the following Tuesday. She then asked him about her husband; Hutchins said: "I don't know about Larry yet. He gave me a lot of grief, and I'm still thinking about it. But I'm not sure yet whether I'm going to call him back or not." When she told her husband about this conversation, he called Hutchins on the following day and asked him if he was going to be called back. He testified that Hutchins said no, because he gave him a lot of grief. He also said that he had a flesher, he asked who his savior was, and said that the Union doesn't run the shop, he does. Hutchins told him that he wasn't sure what he was going to do, but if he got another job, to take it. Hutchins testified that when Burdick called him, he asked him if he was going to hire him back for fleshing. Hutchins told him that due to the problems that he had with him, with the equipment and his attitude, as will be discussed more fully below, and with everything in his file, he would not hire him back as his primary flesher because he could not depend on him. Burdick responded that the Union said that he had to take him back. Hutchins responded: "The Union doesn't run this place, I do." He testified that in this conversation he never asked Burdick who was his savior: "That word's not in my vocabulary."

Hutchins testified that the reason he did not recall Burdick in December was due to his bad attitude and "workmanship." As far as Burdick's attitude, he was a "chronic complainer" and had been so throughout his employment with the Respondent:

> [Y]ou couldn't satisfy him. If he needed a pair of gloves, you give him a pair of gloves; well, they weren't right, this was wrong, that was wrong. He needed another, a new apron or a pair of boots. It doesn't matter what you gave him, he would have a complaint about it. I didn't have that problem with any other employee.

On many occasions he spoke to Burdick about his attitude. Another problem was that Burdick was abusive to the tanning machines that he worked on. He testified that Respondent's tanning machines were old, but that is common in the industry, and in order for the machines to last, they must be treated well. If a piece rate employee such as Burdick lost production time because he reported a machine that was not operating properly, he would not lose income because Hutchins would pay him his past average rate during the period that the machine was down. On a number of occasions he has seen Burdick being very hard on the machines, principally the pedal that is used to operate the machine. "You can step on a pedal and make the machine wind it out, and you can stomp on a pedal to try to break something. There's a difference." He determined that Burdick was attempting to accomplish the latter, and spoke to him about it on many occasions. Burdick's work record contains an entry dated June 12 stating: "Given a verbal warning for being abusive to machinery (equipment)," and one dated July 29 stating:

"I'll break this f--ing machine. Was given another warning for being abusive to equipment & Bob[2] also told him that if I heard him say this- I would have discharged him immediately." Hutchins spoke to Burdick about this situation and told him that there were only 2 days left for them to complete the skins, and please, don't wreck the last machine. He could not remember Burdick's response. During the 1996–1997 season, in Burdick's absence, the Respondent did not have the same level of tanning machinery breakdown as they did the prior year.

On about two or three occasions, beginning in about March, Hutchins told Burdick that he had a problem with the quality of the work that he was producing. The problem was that Burdick was leaving too much flesh on the skins that he was working on. This could be corrected by Respondent's maintenance department, but Burdick would not stop work to tell them, and he continued working in order to get the largest number of skins produced, even though it was done in an unsatisfactory manner. He told Burdick, that if there is a problem stop and have the machine adjusted, since there was no sense in doing the job wrong. Because of this problem, in August the Respondent had to give an $8000 credit to its principal customer. Burdick testified that on one occasion Hutchins told him that the work he was producing was not as good as it should have been. Burdick told him that it wasn't his fault, that "the machine was raising hell," and Hutchins told him that if he had a problem with the machine, he should stop and have it fixed. Burdick also testified that in about June two of the three fleshing machines were broken and out of service and Hutchins told him that he believed that Burdick was abusing the machines "and he would fire me." He does not remember Hutchins giving him another verbal warning for allegedly saying: "I'll break this fucking machine."

Hutchins testified that another problem that he had with Burdick was that he wouldn't follow plant rules on breaktime. Most of the employees, including Burdick, were supposed to take their morning break from 9:30 to 9:45, and Burdick did so until late April. From April 24 until May 8 he was given three verbal warnings for refusing to take his break at the proper time. At about that time, he began taking his break at 10 a.m. the same time that Williams, who arrived at work at 4 a.m. took his lunch break. On these occasions and others, Hutchins spoke to Burdick about these variances from the rules, and Burdick basically told him that he would do as he pleased. There is also an entry dated May 16 that Burdick was given a verbal warning for punching another employee's timecard. Hutchins testified that Burdick and his wife arrived at work at the same time in the morning and she began working before he was scheduled to begin. He punched in both timecards when he was ready to report to work. Hutchins testified: "The benefit to . . . her would be getting a head start on the day's work. If I had to pay average rate, which happens quite often, that raises her average rate for the day, because it shows less hours on her card than she actually worked."

Burdick testified that prior to the filing of the Union's petition Hutchins told him that he was a real good worker, one of the best in the county; Hutchins denies making such a statement. Burdick also testified that during the 1994–1995 season he received only one warning, for leaving work early. His work record lists his first warning as April 24. In addition, Hutchins was always telling him that he was taking his break at the wrong time and he received four or five verbal warnings from Hutchins about improper breaktimes. He was aware that Hutchins wanted him to take his breaks at 9:30 a.m., but believes that he received these warnings because Hutchins did not want him to take his break later, with Williams. Prior to April 18, when the petition was filed, Hutchins never warned him about taking a break at the wrong time. He testified further that the only occasion that he received a warning for a timecard infraction was when somebody else punched in his and his wife's time card. They arrived for work an hour late, didn't notice that their card was punched in, and they punched in again. He does not remember being reprimanded by Hutchins for punching in his wife's time card.

Hutchins testified that in November, when he had decided not to recall Burdick, he called Harry Miller, who had assisted Burdick in doing some fleshing beginning in about early 1996. He asked Miller if he would be interested in being the primary flesher for the Respondent for the 1996–1997 season. He said that he would think about it, but a few days later, Miller called him back and said that he had obtained employment with another tannery and therefore was not interested in the job. Miller testified for the Union at the representation hearing on July 12, between Williams and Carol Burdick. Hutchins then offered the job to Lee Bruce, who spent about 50 percent of his time doing fleshing with Burdick the prior season, and he accepted the job and was hired.

Burdick's last job before obtaining employment with the Respondent was at Allied Splits, a unionized company that closed down in 1994, where he earned $8.60 an hour. An additional defense of Respondent herein is that Burdick was not recalled for the 1996–1997 season because Hutchins thought that he was going to return to Allied. Hutchins testified that during the 1995–1996 season, at least once a week, "somebody" told him that Burdick said that as soon as Allied reopened he would go back there and had been promised a job, although Hutchins knows that Allied does not perform fleshing work. The understanding in the industry was that Allied would reopen during the 1996–1997 season and did reopen in June or July 1997. He testified that there are only four or five tanners in the county and tanning is a very competitive industry; if Burdick left in the middle of the season to go to Allied, he would have been hard to replace. He never asked Burdick about his alleged intentions: "I figured it would be pointless. I mean, had I asked him. . . . I am sure he would not have admitted it." When I asked Hutchins how much of a factor this fear represented in his decision not to recall Burdick, he said that percentage-wise, it was probably 15 to 20 percent. Burdick testified that he does not remember telling anyone at the Respondent that he would leave the Respondent to work for Allied when they reopened: "I don't think I ever turned down a $15 job down to a $9. I Ain't stupid."

Received in evidence were letters from counsel for the Respondent dated February 27 and March 18, 1997, stating Respondent's position on the charges here. The February 27 letter, which refers to five employees, including Williams and Carol Burdick in addition to Burdick, makes no mention of the Allied situation, or Burdick leaving too much flesh on the skins as a reason for not recalling him in December.

IV. ANALYSIS

The controlling principal is set forth in *Wright Line*, 251 NLRB 1083 (1980), which states that initially the General

[2] These entries are entered by Linda Hutchins, the secretary, and Hutchin's wife, at the direction of Hutchins.

Counsel must establish a prima facie case sufficient to support the inference that the individual's protected conduct was a "motivating factor" in the employer's decision to terminate, or in this case not to recall, him. If the General Counsel has satisfied this requirement, the burden then shifts to the employer to establish that the employee would have been discharged "even in the absence of the protected conduct."

The principal strengths of the General Counsel's case here are the timing of Respondent's warnings to Burdick and the weak nature of some of the reasons given by Respondent for its failure to recall him. The weaknesses of the General Counsel's case are the limited union activity that Burdick engaged in, the lack of direct evidence that the Respondent was aware of the activity, and the fact that a number of other employees, including Carol Burdick, testified at the representation hearing for the Union and continued to work for, or like Miller, were offered reemployment by, the Respondent. The petition was filed on April 18. There are numerous innocuous notations in Burdick's work record prior to that, but none involve warnings; rather, most of these notations involve leaving work early, or asking to leave early, not coming to work, or asking for certain days off. The only "serious" offense prior to April 18 was in October 1995, when he asked to stay late to complete some work, and Hutchins walked by and saw another employee performing his work. This pattern changed very abruptly on April 24, probably within a day or two of when Respondent received the petition, when Burdick received his first verbal warning for taking his break at an improper time. Within 2 weeks he had received two additional verbal warnings for the same offense. He received one verbal warning each month in May, June, and July for, allegedly for punching another employee's timecard in for work, for being abusive to the machinery, and for his alleged threat to break a machine. The suddenness of this change can be attributed to only two possibilities: that on the filing of the petition, Burdick abruptly changed his attitude, or that the Respondent totally changed its attitude, at least, toward, Burdick. I find the latter more likely. Within about 2 weeks of its receipt of the petition, Hutchins gave Burdick three verbal warnings for improper breaktimes. Not only were these the first warnings that he had received, but the Respondent never explained the seriousness of these alleged infractions. While Burdick was not the most responsive or direct witness, I credit his testimony that he took his breaks during this period to talk to Williams, his cousin, and one of the leaders of the union movement. Considering the nature of Burdick's job, the only harm to the Respondent that I can perceive in this brief delay in his breaktime, is that it gave Burdick and Williams an opportunity to discuss the Union. Although counsel for the General Counsel never directly established Respondent's knowledge of Burdick's Union activities, at least, prior to April 24, when its treatment of him changed, or July 15, when he testified at the representation hearing, "'knowledge' need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." *Montgomery Ward & Co*., 316 NLRB 1248, 1253 (1995). That finding can certainly be made here. Prior to April 24, Burdick had, basically, a clean record with only minor notations and no warning. The abruptness of the change in Respondent's treatment of him beginning on April 24 leads to the inescapable conclusion that it resulted from Respondent's receipt of the petition a day or two earlier.

Further enforcing this finding is the timing of the failure to recall Burdick. Respondent would normally recall its employees in November or early December. Four to 6 weeks earlier, a hearing officer's report on challenged ballots and objections issued on October 15, sustaining two of the Union's objections based on conduct by Hutchins, thereby setting aside the election conducted on May 24 ordered that a rerun election be conducted, and sustained the challenges to the ballots of Miller and Linda Hutchins. No exceptions were filed to this report and the Board, by Decision, Order and Direction of Second Election dated December 4, adopted the hearing officer's recommendations. Respondent therefore knew prior to December 3 that, based on the representation hearing and the hearing officer's report, there would be a rerun election.

Counsel for the General Counsel, in his brief, stresses the "proffered vacillating and inconsistent justifications offered by Respondent" as further proof of this violation. I do not necessarily agree. The basis of this argument is that counsel for the Respondent's position letter did not include its fear of losing Burdick to Allied, and the $8000 credit it gave its customer allegedly because of Burdick's work as a factor in its failure to recall him. However, this was a seven-page letter answering the allegations about four other employees, as well as Burdick. With so many issues and facts to present, Respondent should not be faulted for not including everything. I should note, however, that I found the "Allied" defense incredible because of the unanswered questions it presented: why would Burdick give up a $15-an-hour job for one paying $9, especially since Allied does not do fleshing? And if Hutchins really heard people telling him every week that Burdick said that he was going to return to Allied as soon as it reopened, why didn't he ask Burdick whether that was true? I therefore reject this defense.

It is alleged that the refusal to recall occurred during a telephone conversation between Burdick and Hutchins on about December 3. This call was precipitated by a conversation about a day earlier in which Hutchins told Carol Burdick that, while he would take her back for the next season, he wasn't sure about Burdick, because: "He gave me a lot of grief." When Burdick called Hutchins, Hutchins (according to his testimony) said that he would not recall him because he gave him a lot of grief, asked who his savior was, and said that the Union didn't run the shop, he did. According to Hutchins testimony, he did tell Burdick that he gave him a lot of grief, meaning attitude, work performance and damaging the machines, and said that the Union didn't run the shop in response to Burdick's statement that the Union told him that Respondent had to take him back; he never said anything about a savior. Although this is a difficult credibility determination, I would credit Burdick's version as more logical. Due to my findings discussed above, I find that the only "grief" that Hutchins could have been referring to related to Burdick's union activities and his breaktime discussions with Williams. In that regard, as Williams was one of the leaders in the union movement, I credit Burdick's testimony that Hutchins referred to a savior, meaning Williams, and on his own said that he, not the Union, ran the shop. I therefore find that even though a number of other employees who testified for the Union continued to work for the Respondent, the General Counsel has sustained his initial burden under *Wright Line*, and that the Respondent has not established that it would not have recalled Burdick even absent the union activities, and that Respondent has therefore violated Section 8(a)(1)(3) of the Act. I also find that Hutchins' statements to Burdick in their

telephone conversation on December 3 violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated the Act by telling an employee that he would not be recalled because he supported the Union.

4. Respondent violated Section 8(a)(1) and (3) of the Act by failing to recall Larry Burdick to employment on about December 3, 1996.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent unlawfully refused to recall Burdick on about December 3, I shall recommend that it be ordered to offer him immediate reinstatement or recall to his former position during the period of its season, from about November to June or, if that position no longer exists, to a substantially equivalent position without prejudice to any of his rights and privileges. I shall also recommend that Respondent be ordered to make him whole for any loss that he suffered as a result of the failure to recall him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]